IN THE COURT OF APPEALS OF THE STATE OF ALASKA

LEONARD GRANT SAGE, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-11330 Trial Court No. 3AN-09-6812 CR MEMORANDUM OPINION No. 6314 — April 27, 2016

Appeal from the Superior Court, Third Judicial District, Anchorage, Beverly W. Cutler, Judge.

Appearances: Shelley K. Chaffin, Anchorage, for the Appellant. Elizabeth T. Burke, Assistant Attorney General, Office of Criminal Appeals, Anchorage, and Michael C. Geraghty, Attorney General, Juneau, for the Appellee.

Before: Mannheimer, Chief Judge, Allard, Judge, and Hanley, District Court Judge.*

Judge MANNHEIMER.

Leonard Grant Sage appeals his conviction for first-degree sexual assault for engaging in sexual penetration with a woman who was intoxicated and unconscious. Sage argues that the State should not have been allowed to introduce evidence of the

* Sitting by assignment made pursuant to Article IV, Section 16 of the Alaska Constitution and Administrative Rule 24(d).

statements that he made to the police when they arrived on the scene and pulled him off the victim. Sage claims that his statements were obtained in violation of *Miranda v. Arizona*,[1] and also that evidence of these statements was barred by the hearsay rule.[2]

Sage's *Miranda* claim was not raised in the trial court; it is therefore not preserved for appeal. Indeed, one might argue that the claim is completely waived — because our supreme court held in *Moreau v. State* that "justice does not generally require that [the exclusionary rule] be applied on appeal where it is not urged at trial". 588 P.2d 275, 280 (Alaska 1978).

We recognize that the *Moreau* decision dealt with an unpreserved Fourth Amendment claim, not an unpreserved *Miranda* claim. But even assuming that Sage's *Miranda* claim can be pursued on appeal as a claim of plain error, the record of the trial court proceedings does not demonstrate plain error.

Because Sage did not raise his *Miranda* claim in the trial court, the trial court never held an evidentiary hearing to investigate the circumstances of Sage's interaction with the police when they arrived on the scene. The trial court never made any factual findings on this matter, nor did the trial court issue any ruling as to whether Sage might have been in custody for *Miranda* purposes when he made his statements to the police. As the State notes in its brief, it is even possible that Sage *did* receive *Miranda* warnings, and that he knowingly waived his rights before he made the statements that were introduced at his trial.

For these reasons, the record does not demonstrate a plain violation of *Miranda*.

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[1] 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

[2] Alaska Evidence Rule 801.

Turning to Sage's hearsay argument, this argument is frivolous. Because Sage was the State's opponent in this litigation, the hearsay rule did not bar the State from introducing evidence of his out-of-court statements. *See* Alaska Evidence Rule 801(d)(2).

Sage raises one additional argument on appeal: he claims that the trial judge committed error by allowing the State to introduce evidence that Sage had earlier committed an act of sexual penetration on a woman who was asleep. (Sage pleaded guilty to third-degree sexual assault based on this incident.)

The trial judge ruled that evidence of this prior sexual assault was admissible under Alaska Evidence Rule 404(b)(3). This evidence rule states that when a defendant is being tried for sexual assault, evidence of the defendant's other acts of sexual assault is admissible if the defendant relies on a defense of consent.

Sage did not take the stand at his trial and affirmatively assert that his victim consented to the act of sexual penetration. However, the defense attorney's cross-examinations of the State's witnesses were designed to suggest that the victim invited Sage to engage in sex with her — in essence, a defense of consent. We therefore uphold the trial judge's decision to allow the State to introduce this evidence.

Conclusion

The judgement of the superior court is AFFIRMED.